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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 543

CHARLES D. STUART, *et al.*,

Appellants,

v.

WILL WILSON, ATTORNEY GENERAL OF TEXAS,

and

TEXAS STATE BOARD OF MEDICAL EXAMINERS,

and

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,

Appellees.

On Direct Appeal From the United States District Court for the Northern District of Texas, Dallas Division

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM OR DISMISS

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To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Come Now the Appellants under the provisions of Rule 16 and file herewith their Brief opposing the Appellee's Motion to Affirm or Dismiss, and therefor say as follows:

This case is before this Honorable Court on a direct appeal from a judgment rendered by a specially constituted

three-judge district Court. As I view it, under Rule 16 of this Honorable Court, this Honorable Court by its own Rules will not receive or entertain a Motion to Dismiss this appeal. I say this because apparently paragraph 1. (c) is the only paragraph under Rule 16 which would pertain to this case. Paragraph 1. (a) of Rule 16 provides that "The Court will receive a Motion to Dismiss any appeal on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute or to these Rules." I respectfully suggest that this appeal is appropriately taken in accordance with the Statutes and these Rules. In particular, I would like to mention Section 1253 of Title 28, U.S.C.A., which specifically provides that "Any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." This is the type of appeal in this case and the jurisdiction of this Honorable Court over this case is discussed at length on pages 3, 4, 5, 6 and 7 of the Jurisdictional Statement; and Appellants respectfully refer this Honorable Court to such pages in the Jurisdictional Statement rather than taking this Honorable Court's time by repeating the contents thereof again in this Brief.

Therefore, it would appear that paragraph 1. (c) of Rule 16 would be the only provision pertaining to Appellees' Motion that this Honorable Court would even consider. Such paragraph 1. (c) provides that "The Court will re-

ceive a Motion to *Affirm* the judgment sought to be reviewed on Appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." (Italics mine.)

Thus, it would appear to the Counsel for Appellants that the only question raised by the Appellees' Motion is whether the Court should at this time affirm the Trial Court's judgment on the ground that it is manifest that the questions on which the decision of the Cause depends are so unsubstantial as not to need further argument. Let me say this: The questions on which the decision of this cause depend are so substantial that the very foundations of our system of free enterprise depends on the answers to them; the very right to follow and pursue a lawful occupation without unreasonable governmental interference is involved; the very right and freedom of medicine, a basic subject that touches every citizen of the United States of America, is involved. As set forth on pages 7 through 23 of the Jurisdictional Statement there are some 52 questions presented by this Appeal. And permit me to say this: The Supreme Court of Idaho on April 8, 1959, in the Case of *State of Idaho ex rel., State Board of Medicine of the State of Idaho, S. M. Poindexter, Chairman v. David Smith, 337 Pac. 2d 938-942*, held squarely in the affirmative on one of the principal questions involved in the case before this Bar. In the *Idaho* case, the Supreme Court said, "The right to follow a recognized occupation is a right protected by the Constitutional guarantees of liberty. Fourteenth

Amendment to the Federal Constitution * * *. To require one desiring to engage in the practice of Naturopathy to meet the requirements prescribed for physicians and surgeons would be an unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition. So far as Section 54-1802, I.C. *(Portion of Idaho's Statute regulating the general practice of medicine and surgery or allopathy which is similar to Texas Statute)* (Reference in parenthesis is mine) affects the practice of Naturopathy, the act is unconstitutional and void." What question could be more substantial than where a State Supreme Court has answered such question directly in favor of these Appellants; and as this Honorable Court will see from the many substantial questions presented in the Jurisdictional Statement, it is manifest that this case should be heard on the merits by this Honorable Supreme Court.

If the Court will permit me, I would like to make a brief comment relative to the cases cited by the Appellees in their Motion.

The cases cited by Appellees generally hold that Naturopathy is classified as a form of practicing medicine, and that naturopaths have to be licensed as physicians and surgeons before they can practice naturopathy. Appellants agree that Naturopathy is a form of medicine, although both the President and the Secretary of the Texas State Medical Board were reluctant to admit in their testimony that Naturopathy was a form of medicine. Appellants submit by the very definition of Naturopathy, which defini-

tion is fully set forth on page 33 of the Jurisdictional Statement, Naturopathy is a limited, narrow field or segment of the practice of medicine. Although, more properly, it should be referred to a limited, narrow field or segment of the *healing art*. It is actually a limited school of medicine, as compared with eclectics, homeopaths, allopaths, osteopaths and chiropractors. Appellants agree that the State can regulate the practice of medicine and naturopathy; and Appellants seek such regulation. This leads us to the very bone of contention in this case: *Is it unreasonable for the State of Texas to require a Naturopath to qualify for and obtain a license as a general medical practitioner and surgeon (an allopath) before the Naturopath can practice his well recognized, limited field of the healing Art?*

I believe that it is fundamental that a State may not prohibit the practice of medicine or surgery; but that the State, under its police power, may regulate, within *reasonable* bounds, for the protection of the public health the practice of either by defining the qualifications which one must possess before being permitted to practice the same. *Hawkes v. People of State of New York, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002; Dent v. State of West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623.*

The case of *England, et al. v. La. State Board of Medical Examiners, et al. (Fifth Circuit—Orig. Op. Sept. 9, 1958), 259 Fed. 2d 626 (Pet. for reh. den. Jan. 23, 1959), 263 Fed. 2d 661 (Pet. for Writ of Certiorari den., June 1, 1959), 359 U. S. 1012, 3 L. Ed. 2d 1036; 79 S. Ct. 1149;* holds that no court can supersede the authority of the State legisla-

sure, but that it can determine if a law regulating the practice of an allegedly useful profession is so arbitrary and unreasonable as to amount to a denial of due process or of the equal protection of the laws under the Fourteenth Amendment. *England* further holds that no court, state or federal, has held that a state legislature has *unlimited* power or authority even with respect to subjects such as the health and welfare of the people of the state; and that although the primary responsibility rests with the state legislature, the courts have a solemn and inescapable duty of deciding whether state action is so arbitrary and unreasonable as to be unconstitutional. In response to the Appellees' contention that the Appellants herein can take the examinations for and qualify as general medical practitioners and surgeons and then practice as naturopaths, the *England* case says the answer is that the mere form of the statutes cannot justify or excuse the deprivation of one's rights under the Constitution of the United States; that the "practice of medicine" is defined broadly enough to apply to dentists, nurses and pharmacists; and that each of these professions is protected by a special statute, but if it was not, would anyone deny the jurisdiction of a federal district court to protect a dentist, a nurse, or a pharmacist in the practice of his or her useful profession or calling?

So it is with the Naturopaths. In the case at bar the evidence overwhelmingly showed that the practice of naturopathy and the practice of general medicine and surgery are separate and distinct; the Appellees' Witnesses who were instructors at the Southwestern Medical School (a recog-

nized general medical and surgical school testified that they did not instruct in Naturopathy, and knew little, if anything, about it. The Secretary and President of the Texas State Board of Medical Examiners testified that they did not examine a person to determine if he was qualified to practice Naturopathy; that they examined on general medical and surgical subjects; that they knew little, if anything, about Naturopathy; and that they did not issue a Certificate to practice Naturopathy. The witnesses for the Appellants testified at length as to what Naturopathy was, distinguished it from the general practice of medicine and surgery, and using an exhibit, which was a copy of the official examination given by the Texas State Board of Medical Examiners, explained in detail why it would be unfair, unreasonable and arbitrary to require a Naturopath to pass the same before he could practice Naturopathy, and why such examination had no reasonable, rational or substantial relation to the practice of Naturopathy; and that such examination was for those who desired to practice general medicine and surgery or allopathy. Therefore, the evidence and law in this case definitely and overwhelmingly reveals that it is unreasonable for Appellants to have to qualify for and obtain a general medical and surgeons license before they can practice their well-recognized, narrow, limited field or school of the healing arts known as Naturopathy.

WHEREFORE, Because the question of health affects all citizens of the United States, and the limited school of the healing art of Naturopathy is basically so important,

and which school could some day become the most important method of treatment in the United States; and because such limited school of the healing art should not be unthoughtfully annihilated at this time by unreasonable and arbitrary regulations of its practitioners by a State Statute which is unconstitutional in so far as it applies to them, the Appellants pray that the Appellees' Motion to Affirm or Dismiss be in all things overruled; or in the alternative, that the consideration of the question of Jurisdiction be postponed until the hearing of the case on the merits; and Appellants further pray for the same relief on the merits as fully set forth on pages 72 and 73 in the Jurisdictional Statement.

Very respectfully presented,

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PROOF OF SERVICE

I, James L. McNees, Jr., the Counsel for Charles D. Stuart, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of January, A. D. 1963, I served copies of the foregoing Appellants' Brief Opposing Appellees' Motion to Affirm or Dismiss on the Appellees by mailing two copies thereof in a duly addressed envelope, with Air Mail postage prepaid, to Tom I. McFarling, Esq., the Counsel of Record for Appellees, with such envelope addressed to Honorable Tom I. McFarling, Special Assistant Attorney General of Texas, Capitol Station, Austin, Texas.

JAMES L. MCNEES, JR.